

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RICHARD D. MARTINEZ and KATHERINE BAUM,

Complainants,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on December 2, 3, and 30, 2003, and January 6, 2004, at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Nicolas Gradisar, Esquire, represented Complainants Richard Martinez and Katherine Baum ("Complainants," "Martinez," and "Baum"). Assistant Attorney General Andrew Katarakawe represented Respondent Department of Corrections ("Respondent" or "DOC").

MATTERS APPEALED

Martinez appeals his disciplinary fine in the amount of \$300.00. Baum appeals her disciplinary fine in the amount of \$500.00. They both seek rescission of the disciplinary actions and attorney fees and costs.

During the pendency of this case, Respondent issued a final agency response to Martinez' grievance of a corrective action and transfer that accompanied his disciplinary fine. The final agency action rescinded the corrective action but affirmed the agency's transfer of Martinez to a different work unit. Martinez also appeals his transfer.

For the reasons set forth below, Respondent's actions are **affirmed**.

PROCEDURAL ISSUES

On December 30, 2004, during Respondent's case-in-chief, the parties stipulated and the undersigned ordered that in the interests of judicial economy Martinez' appeal of the final agency action on his grievance would be consolidated with this case.

A protective order is in effect, placing Exhibit 10, DOC's investigative report, under seal pursuant to Section 24-72-204, C.R.S.

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ISSUES

1. Whether Complainants committed the acts for which they were disciplined;
2. Whether Respondent's actions were arbitrary, capricious or contrary to rule or law;
3. Whether Complainants are entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant Martinez commenced employment with DOC in August 1989. In May 1998 he transferred to the Central Transportation Unit ("CTU") as a Lieutenant, Correctional Officer III.
2. Complainant Baum has served with DOC since 1986. She has been a Captain for eleven years. She came to the CTU in 1996.
3. CTU consists of approximately 30 officers. Captain Baum presides over three Lieutenants (Martinez, Roberts, and Styce), several Sergeants, and line officers.
4. CTU is a highly coveted, elite unit. The officers enjoy weekends off, daytime work shifts, and the relative freedom of not working in a locked down prison environment.
5. The mission of CTU is to transport inmates (and their personal property, medical and prison records) safely and securely from one prison to another. The unit also conducts transports of prisoners to court and to medical facilities.
6. The CTU is responsible for many types of "transports" or "trips." Some trips are easier and more desirable than others.
 - A. High Risk/High Security Transports of One Inmate. These transports require two officers. They normally involve extra pre-trip preparation, but provide the officers more down time on the job, more time in the office, and more time to eat. These are desirable trips.
 - B. Mass Transports - Bus Trips. These are tough trips involving the transport of up to 40 inmates, all of their personal possessions (including TV's, books, clothes, etc.), and all official prison paperwork, including medical records, on each prisoner. The logistics of these trips are significant. Two officers plus a sergeant staff these trips.
 - C. Medical Transports. These local trips are usually easy, requiring the transport of only one inmate to the hospital.
 - D. Court Trips. Court trips involve the transport of one or two inmates. They are comparatively easy. In July 2000 the Colorado General Assembly passed legislation

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requiring that all inmates with positive drug tests be prosecuted in downtown Denver. CTU's court trips increased by 95%.

- E. Out-of-State Trips. These are highly desirable trips because the officers earn significant extra pay for making them.

General Performance of Baum and Martinez

7. Captain Baum is extremely dedicated to her job. Her performance evaluation for the period April 2002 to March 2003 is at the Outstanding level. Her leadership is credited for the "miniscule number of incidents . . . in this highly volatile environment."
8. Captain Baum's evaluation also notes, however, "Sometimes her tact may not be understood by her subordinates but her guiding principles do not and should not waiver."
9. Martinez' performance evaluation for the period April 2002 to March 2003 is also at the Outstanding level. The document recognizes his high standards of excellence, his role in the development of an Escape Team Training Program and a protocol for out-of-state transports, and his delegation of outside training responsibilities to his subordinates, resulting in their career development.

December 2002 Grievance

10. In December 2002, Mary LaPerriere, an administrative staff member of CTU, wrote a memorandum to DOC administrators alleging a hostile work environment, favoritism by Captain Baum and Lt. Martinez on the unit, and that Martinez and Baum were having an affair.
11. LaPerriere brought her concerns to Lt. Roberts. Under DOC regulations, Lt. Roberts was required to inform her of the administrative regulations governing such complaints, and to assist her in filing her grievance with the Inspector General's Office. He did so, and she filed her complaint. She also faxed to the appointing authority, Lou Archuletta, a copy of a time sheet for one of the CTU officers that she felt demonstrated he had received payment for two days not worked.
12. The matter was assigned to Inspector Claspell for investigation. Because one of the primary allegations could have constituted embezzlement, the investigation was initially deemed criminal in nature.
13. Inspector Claspell maintained confidentiality throughout his three-month investigative process. He interviewed approximately a dozen officers in CTU, and reviewed a number of documents. After he had compiled all information he deemed relevant over a three-month period, he then interviewed Captain Baum and Lt. Martinez, separately. Inspector Claspell's interviews of Baum and Martinez were detailed and thorough.

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14. In May 2003, Inspector Claspell issued his investigative report, concluding that many of the complaints of misconduct and mismanagement of the unit by Captain Baum and Lt. Martinez were founded. Appointing authority Archuletta reviewed the investigative report and followed up with his own investigation.

Actions Leading to the Perception of an Inappropriate Relationship

15. During the first few years of her tenure at CTU, Baum spent the majority of her time in her office. Approximately a year and a half after Martinez arrived on the unit, Captain Baum began to spend nearly all of her time with him. She scheduled herself and Martinez for as many transports together as possible together, usually alone. Many of these transports with Martinez normally would have required only one officer, such as armed chases and court duty. Many staff noticed these trips did not necessitate two high level officers.
16. Baum also accompanied Martinez on numerous overnight out of state transports.
17. CTU officers noticed that Martinez and Baum appeared overly close, often standing or sitting inappropriately close to each other. Many CTU officers, up to the level of lieutenant, felt that Baum and Martinez failed to maintain the appropriate professional distance from each other.
18. Several officers saw Martinez walk Baum to her car and then lean down into the window to talk to her in a manner implying intimacy.
19. In the spring or summer of 2002, one officer saw Baum and Martinez emerge from the basement of the building, first thing in the morning, both flushed, Baum tucking in her shirt, Martinez fixing his pants and checking his buttons.
20. According to Complainants' own witnesses, approximately half of the officers in the CTU discussed the rumor that the two were having an affair. When CTU officers arrived at other prisons to drop off prisoners, other officers routinely asked them whether Baum and Martinez were having an affair.
21. In Martinez' interview with Inspector Claspell, he stated that the only time he routinely called Captain Baum during off duty hours was after work during the week. Inspector Claspell's review of Martinez' cell phone bills demonstrated that Martinez routinely called Captain Baum's pager, cell, and home phone number on weekends. There is no evidence suggesting calls on weekends were work related.
22. The perception of an affair between Baum and Martinez was severely detrimental to the CTU officers' morale. They perceived that Martinez was receiving special treatment from Captain Baum.
23. As the leader of the CTU, Baum was responsible for being aware of the perceptions she created for subordinate staff, through her actions and behavior. She demonstrated poor

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management in failing to be aware of these perceptions and to act on them.

24. As a lieutenant at CTU with line authority over many of the officers, Martinez was responsible for being aware of the perceptions he created for subordinate staff, through his actions and behavior. He demonstrated poor management in failing to be aware of these perceptions and to act on them.

Favoritism Toward Certain Members of CTU

25. CTU absorbed the medical transport unit in 1999. Captain Baum then created three core teams, the high-risk team, the medical team, and the mass transport team. While the division of the unit into teams was initially a reasonable means of allocating the work of CTU, it ultimately became destructive to morale.
26. The "high risk team" consisted initially of Baum's more experienced officers. Over time, however, it became known as the "A team" and consisted of her favored officers, irrespective of rank or experience level.
27. Captain Baum had favorites and all staff knew who they were. With exclusive authority over staff assignments, Captain Baum assigned her A team to high-risk transports and other local, easier trips. She also occasionally invited them to accompany her and Martinez on out of state trips, for which they received extra pay. (See below.)
28. Although Baum testified that she rotated trips equally among staff, the weight of the evidence demonstrates that she generally did not, prior to December 2002, the time period at issue.
29. Captain Baum also practiced what some officers dubbed, "security by convenience." Many officers noticed that one day Captain Baum would enlist an unnecessarily high number of her A team members on a high risk transport, and the next day the same prisoner would be transported on a low risk basis, with dozens of other inmates, on a bus, clearly demonstrating there had been no need for the high risk transport the previous day. CTU staff appropriately perceived this as favoritism on Captain Baum's part.

Out-of-State Trips

30. Out-of-state trips were the highest perk in CTU. The means by which Captain Baum allocated these highly paid trips to her staff demonstrated favoritism.
31. Captain Baum never announced the trips to the entire unit. She never provided a fair and equitable means of allowing officers to sign up or compete for the opportunity to go on these trips. She did not choose officers on the basis of seniority rank, or performance.
32. Instead, Captain Baum personally invited those she favored to go on out-of-state trips.

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33. Martinez accompanied her on nearly all of these trips. A Team members such as Bill Garoutte, Anthony Soto, and Jeremy Brandt were chosen by Captain Baum to go on four or more out of state trips each. Other officers, such as Carmen Juliano, who has been with CTU for ten years, has never been on an out of state trip. Sgt. Drake, with CTU since 1998, has never been on an out of state transport; he asked to go on a number of them but was never chosen.
34. The secretive and selective manner in which Captain Baum allocated out-of-state transports created strong feelings of resentment and low morale among those not chosen or included in the information loop. This practice demonstrated poor management and a notable lack of awareness of the adverse affect her actions had on unit morale.
35. Captain Baum's close relationship with Lt. Martinez, the fact she chose him for nearly all of her transports, and her obvious favoritism towards Team A members, drove a wedge between the officers in the unit.
36. While Baum and Martinez were out on trips, if Lt. Styce was not available, Captain Baum usually left one of her A team members in charge of the office, Steve Ravenelli or Garoutte, both of whom were low in seniority. Office detail was normally a lieutenant's or captain's post, and the position was responsible for making decisions for sergeants and lieutenants out on the road. This offended the more senior officers and it adversely affected morale.
37. According to numerous CTU officers, if an employee expressed displeasure with a decision, Captain Baum would often respond, "if you don't like it here, you can go get another job," or, "If you don't like it here you can always transfer out, I can help you transfer out." She also said, "if you would like to transfer to a different unit, go ahead. I can get anybody in here." Captain Baum admitted at hearing to having told Seley and Drake, if there is something you don't like, I will help you transfer. She appeared unaware of their intimidating effect on the officers that served under her.
38. Many of the officers in CTU have a palpable fear of Captain Baum. Lt. Roberts, one of the senior managers on the unit directly below Captain Baum, was visibly nervous when testifying in this case. Many CTU officers subpoenaed as witnesses testified of their fear of retaliation for having testified.

Lt. Roberts

39. Lt. Roberts was one of Captain Baum's favorites on the unit for a long period of time. After the birth of his second child, when his commute from his home in Pueblo to the Denver office became too much of a strain on him, he informed Captain Baum that he would need to transfer to another facility closer to Pueblo. Captain Baum accommodated him by allowing him to work out of the Canyon City facility three days a week.

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40. In late 2002, when Mary LaPerriere came to Lt Roberts with the harassment complaint, Lt. Roberts assisted her in filing her complaint.
41. Thereafter, Captain Baum withdrew Roberts' privilege of working in Canyon City three days a week. Complainants' explanation for this action is rejected as pretextual and self-serving.
42. In addition, after LaPerriere filed her grievance, Captain Baum wrote up Lt. Roberts for an extremely minor weapon incident, while she went out of her way to protect an A team member, Ravenelli, who committed a very serious weapon incident.
43. Lt. Roberts and another officer had accidentally traded weapons. Both were aware of the trade and both weapons were secure, so the situation presented no security risk. Captain Baum had a "closed door meeting" with Lt. Roberts and wrote a letter to his personnel file regarding this incident.
44. By contrast, Officer Ravenelli called Lt. Roberts to report he had lost one of his rounds of ammunition. This is an extremely serious security breach in a prison setting. When Lt. Roberts contacted Captain Baum by telephone to inform her of this, she told Lt. Roberts, "don't tell anybody." The lost round was ultimately found. Captain Baum took no action against Ravenelli.
45. Lt. Roberts' letter was ultimately removed from his file after no additional incidents.
46. Captain Baum demonstrated favoritism towards Officer Ravenelli in her disparate treatment of these two weapons incidents.
47. Sgt. Drake is not one of Captain Baum's favorites. Officer Drake met with DOC Executive Director Jo Ortiz concerning one of Captain Baum's policies he appropriately questioned. After this meeting, Captain Baum imposed long, hard trips on Sgt. Drake, and Lt. Styce began to direct him regarding the specific routes he had to take on each trip. Drake found the time frames provided for these trips to be impossible to meet. Upon his return to CTU from one of these trips, slightly late, Captain Baum yelled at him, "What the f____ do you think you're doing." When officer Drake attempted to talk to Captain Baum, she drove away. (Officer Kirkpatrick was an independent witness to this incident.)
48. Martinez was the training coordinator on CTU. All requests for training had to be approved by him or Captain Baum. There is a widespread belief among CTU officers that Captain Baum and Lt. Martinez exercised favoritism in approving requests for training. Baum and Martinez both testified that no verbal requests for training were ever granted, and that all requests had to be in writing. However, several of Complainants' own witnesses' verbal requests for training had been granted.
49. Martinez and Baum were inconsistent in their handling of requests for and approval of

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training. Their failure to clearly enunciate the rules governing training, and their failure to consistently apply the rules, led to the widespread perception of favoritism.

50. Martinez testified he knew CTU officers felt there was an A team, and that he was aware there was low morale on the unit. He characterized the low morale at hearing as being "nothing out of the norm," however.
51. As Captain Baum's prize employee, Martinez chose to do nothing about the double standard on the unit and the low morale of the officers under his direction. This was a violation of his duty to effectively manage the unit and to treat all employees fairly and equitably.
52. Captain Baum downplayed the issue of favoritism at hearing, suggesting that there will always be complainers in any work unit. She estimated that there are "for or five complainers" in the unit, and that none of them bring complaints to her.
53. However, Complainants' own witnesses testified that the entire unit suffered from low morale. Even Officer Garoutte, who admitted to being a member of the A Team, testified that the majority of people in the unit have a bad attitude.
54. Captain Baum demonstrated a striking lack of effective leadership by creating a work environment where the majority, or a significant number, of CTU officers feel left out, out of favor, resentful of the A Team, and fearful of expressing honest beliefs regarding unit issues.

Falsification of training records

55. As training coordinator for CTU, it was Lt. Martinez' duty to assure all officers receive training as required by law and DOC regulation, and to input and maintain computerized records of all training received by the CTU officers.
56. Use of Force instructors must attend an annual instructors meeting, to fulfill their instructor training requirement. Historically, it was a face-to-face meeting, but in either 2000 or 2001, DOC initiated a new policy whereby the instructors could simply conduct a "rule review" by themselves to comply with the requirement. This appears to have been an informal rule, not adequately relayed to the instructors.
57. The appropriate means of recording the Use of Force instructor rule review is for the instructors to sign a training roster after conducting the rule review. Then, based on that information, Lt. Martinez was to enter that information on the computerized training roster.
58. In February 2002, Martinez became aware that his nine Use of Force instructors were not current on their instructor training. Martinez obtained a training roster form, dated it February 8, 2002, and wrote the names of all nine instructors and their training identification numbers on the form.

59. He then brought the training roster to each of the nine officers and told them to sign it.
60. Martinez did not provide the officers with the updated rules they were certifying they had reviewed, prior to ordering them to sign the roster.
61. Six of the Use of Force instructors signed the form certifying they had performed a "rule review" of the updated Use of Force rules for DOC. They had not done so.
62. Three of the Use of Force instructors did not sign the form.
63. Many of the instructors were unaware that the "rule review" practice was accepted at DOC. Many expressed concern to Martinez, and Carmen Juliano reported to his supervisor, Lt. Styce, that he felt it was wrong.
64. Lt. Roberts refused to sign the training roster.
65. Martinez entered all nine names on the computerized training roster as having completed the training. Each was credited for four hours of training.
66. Martinez falsified the official DOC training records in entering the nine names on the computer roster.
67. As official custodian of the training records for CTU, he breached his duty to assure the accuracy of those official records.
68. Martinez demonstrated poor judgment, poor leadership, and poor ethics in ordering his officers to sign a roster for a rule review they had not in fact performed.
69. Captain Baum had no knowledge of these events concerning the training roster.

Time Card and Compensatory Time

70. Captain Baum and Lt. Martinez made it clear to CTU officers that they were required to report for duty at 6:30 a.m. in order to be prepared to commence their transports promptly at 6:45 a.m.
71. The majority of the CTU officers' sign-in sheets reflect their 6:30 a.m. arrival.
72. Officer Martinez was responsible for entering each officer's time on the computer. He disregarded the time hand-written on the sign-in sheets by the officers. Instead, he entered the standard 6:45 a.m. start time for every employee, regardless of the actual time of arrival.
73. DOC Administrative Regulation 1450-14 mandates, "Overtime Hours: . . . When employees are required OR PERMITTED to work, time spent performing such work is work time."

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(Emphasis in original.)

74. Baum and Martinez, as a matter of policy, did not compensate CTU employees for the extra fifteen minutes of work every morning. This practice violated DOC AR 1450-14.
75. Baum and Martinez also routinely approved sick leave for employees, and then failed to assure that the employees were able to actually take the approved leave when the day arrived.
76. On November 21, 2002, Sgt. Drake had been approved sick leave for a doctor's appointment at end of his shift. Drake had to work so late he missed the appointment. He missed three separate appointments in 2002 under these circumstances.
77. Officer Kirkpatrick sustained a work related injury to his neck in 2001, resulting in Workers Compensation coverage. Kirkpatrick secured sick leave in advance for seven or eight appointments he had scheduled after completion of his CTU shift, not during work hours. Nonetheless, he missed all of these appointments because he returned from transports after the time his shift ended.
78. Upon notification he would be dropped from the Workers Compensation program if he continued to miss appointments, Kirkpatrick discussed the situation with Lt. Martinez.
79. Martinez directed Kirkpatrick to take entire days off to attend the appointments. Kirkpatrick scheduled the appointments for 11 a.m. Martinez allowed him to use paid sick leave for only four hours of the time.
80. Martinez then used four hours of Kirkpatrick's paid annual leave for the remaining four hours, without discussing this with Kirkpatrick first.
81. When Kirkpatrick questioned him about it, Martinez stated that he wasn't sick the entire day, so he had to use vacation time.
82. Martinez wrongfully imposed utilization of paid annual leave on Kirkpatrick because Martinez was unwilling, as his manager, to assure Kirkpatrick returned from transports by the end of his shift.

Bus Maintenance; Unsafe Buses

83. CTU buses used for mass transports of prisoners are very old, with extremely high mileage. There have been numerous problems with brakes giving out during trips, shock absorbers not working, etc.
84. The buses are inspected as required on an annual basis.
85. CTU officers who perform the mass transports do not believe the buses are safe. Prior to

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each transport, the officers are required to perform pre-trip inspections. If the bus is in a questionable condition, it is the job of the officer to report it and have it inspected prior to using it.

86. Even when the DOC-certified inspector examines a problem and deems a bus to be safe, many of the officers remain unconvinced of the bus's safety.
87. The unsafe buses are a security issue for the State of Colorado. Captain Baum is aware of this, but is apparently unable to address this resources issue within the scope of her duties.
88. There is no evidence that either Captain Baum or Lt. Martinez ever ordered a CTU officer to drive an unsafe vehicle or failed to assure proper maintenance of the CTU buses.

Strip Searches

89. Baum often remains in the general area during transports when a strip search is conducted. She does not participate in or watch the search, but remains nearby in case a security issue arises and her intervention is needed.
90. DOC Administrative Regulation 300-06, Searches and Contraband Control, states in part, strip "searches will be conducted by a staff member of the same sex as the offender being searched, except in emergency conditions. Strip searches will be conducted in a private location and in a respectful manner."
91. Baum did not violate AR 300-06 by remaining in the general vicinity.

CTU Promotional Testing for Sergeant Positions

92. Prior to Captain Baum's arrival on CTU in 1996, the unit lost a number of sergeant level positions. During her early tenure at CTU, pursuant to a mandate that preceded her arrival, when a sergeant left the unit, the position was downgraded from CO II to CO I.
93. Over time, the unit grew from fourteen officers to thirty. Captain Baum understood, through discussions with DOC management and DOC Human Resources personnel, that she was permitted to upgrade some of the officers' positions to sergeant through the reallocation process.
94. Captain Baum was faced with a situation where she had so many officers operating at lead worker level that most of them could qualify for the reallocation to sergeant. Captain Baum learned through senior management at DOC that she could informally screen CTU officers interested in the sergeant position.
95. Instead of implementing a screening process, Captain Baum instituted a bona fide test for the sergeant position at CTU, in violation of competitive testing procedures under the state personnel system.

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96. The DOC Human Resources office is charged with administering all competitive tests for classified positions at DOC, pursuant to a Memorandum of Understanding with the Department of Personnel and Administration (delegating that authority to DOC).
97. State Personnel Director's Procedure P-2-9 mandates, if a filled position is reallocated upward, an appointment shall be made in accordance with selection provisions.
98. State Personnel Board Rule R-4-2 mandates, "Selection is based on quality of performance and job-related ability as measured by examinations of competency. All applicants must meet minimum requirements for the vacancy in order to be referred or appointed."
99. Director's Procedure P-4-11 provides, "The selection process is considered to be competitive if a reasonable opportunity was provided to potentially qualified persons to apply and compete against the same standards. Examinations shall be developed, administered, and scored in accordance with written directives. . . All examination materials and scores are confidential except as provided by the Colorado public records act."
100. The DOC Human Resources office is the only entity with authority and expertise to design and administer an exam for CTU and any other DOC positions.
101. Captain Baum, Lt. Martinez, and CTU officers developed the CTU sergeant test, which consisted of a shooting test; a bus driving test; a written test; and an oral interview. The oral interview portion was performed by high-level officers from outside CTU. Officers were also given points for length of service at CTU.
102. Captain Baum, with some assistance from Lt. Martinez, scored the tests herself, and then posted the results publicly, for all CTU officers to see, in violation of P-4-11, which requires confidentiality.
103. The officer that scored highest on the test had his or her position reallocated to the sergeant level. Captain Baum then sent a reallocation request form to the DOC Human Resources office, so the position could be posted throughout the personnel system.
104. CTU officers knew that the top-scoring candidate on the test would receive the reallocation and ultimate appointment to sergeant. Therefore, the only individual that ever applied for the reallocated position was the officer that scored highest on the test.
105. Captain Baum, Lt. Martinez, and all CTU officers viewed, referred to, and treated the sergeant test as a test, not as a screening process.
106. Many officers in the CTU believed the sergeant tests were "fixed" for A team members.
107. The most recent promotional exam was viewed by many officers as having been pre-

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determined by Captain Baum. Nearly every officer was rated the minimum 50 on the oral boards except A team members Garoutte, Ravenelli, and Warner, who scored nearly 100 points.

108. The last CTU test for sergeant was performed in June 2001. Casey Warner received the highest score; he was the only officer that applied for the position once it was posted; he was the only candidate referred to CTU for the position by DOC HR; and, Captain Baum appointed him to the position.
109. Captain Baum promised the next sergeant promotion to Garoutte, another A team member.
110. Some CTU officers complained to Captain Baum about the manner in which the test was graded, and about the test results not accurately reflecting their performance. Captain Baum responded, "you have a right to grieve the test results, but remember where you work." Captain Baum actually wrote that statement on the test results of one officer.
111. The purpose of posting a reallocated position statewide is to invite all qualified candidates to apply for the position. The CTU sergeant test tainted that process both before and after the posting of the sergeant position. No CTU officers other than the highest scorer applied for the position, because it was common knowledge on the unit that the individual hand-picked by Captain Baum, publicly known as the top scorer, would be appointed to the position.

Pre-disciplinary Process

112. Officer Claspell completed his lengthy and detailed three-month investigation prior to interviewing Lt. Martinez on March 12, 2003 and Captain Baum on April 28, 2003. During his separate interviews of them, Claspell asked very detailed questions about all issues covered in his investigation.
113. On May 5, 2003, Officer Claspell issued his final investigative report. Appointing authority Lou Archuletta, Acting Director of Correctional Services, reviewed the report in detail and then sent letters to Baum and Martinez separately, advising them of the need to meet regarding "issues related to Central Transport operations and possible misconduct on your behalf which indicates the possible need to administer disciplinary action and/or corrective action." He did not detail the findings of misconduct contained in the investigative report.
114. Archuletta, Baum, and Martinez all knew that the subject of the pre-disciplinary meeting was the issues discussed in the interviews with Inspector Claspell. Baum and Martinez knew what allegations they would be discussing and defending against, prior to their respective pre-disciplinary meetings with Archuletta.
115. Archuletta had the investigative report in his possession during his pre-disciplinary meetings with Martinez and Baum. In each of these meetings, he reviewed the allegations separately, by number, in detail, and engaged Baum and Martinez in a substantive discussion of each issue.

116. In their respective pre-disciplinary meetings with Archuletta, Martinez and Baum had a full opportunity to provide mitigating and any other information they believed Archuletta should consider prior to imposing discipline or corrective action.¹

Disciplinary Actions

117. Prior to imposing disciplinary and corrective action, Archuletta reviewed the performance records of Martinez and Baum. He considered their outstanding performance ratings to be significant mitigating information.
118. Archuletta viewed Martinez' and Baum's managerial failures as very serious. He places a high value on the work environment and tone set by management, and he concluded that Baum and Martinez together created a negative work environment at CTU.
119. Archuletta's initial response to the situation in CTU was to impose very harsh disciplinary sanctions against both Martinez and Baum. However, after checking with DOC's Human Resources office to gauge what comparable level of discipline had been imposed in similar situations, he decided to impose a far lighter sanction than he initially thought appropriate.
120. On July 17, 2003, Archuletta sent Baum a letter imposing a \$500.00 fine, deducted over five months in \$100.00 increments, and a corrective action imposing supervisory training, regular monthly meetings with her appointing authority, Mr. Zalman, Chief of Offender Services, and directing her to be aware in the future of how her actions impact and are likely to be perceived by the majority of her subordinate staff. Baum did not appeal the corrective action and she has completed all of its terms.
121. In his letter to Baum, he made the following findings of misconduct:
- A. Conduct giving rise to the widespread perception of an inappropriate relationship between herself and Lt. Martinez, including scheduling herself with Martinez on several of the overnight transports. "Your behavior with Lt. Martinez has created a definite belief that disparity in treatment occurs at CTU, and you need to be aware of how your actions and decisions are perceived by subordinate staff. You must administer with a firm but consistent management style. This includes ensuring that **all** subordinate staff, including Lt. Martinez, are treated in a like manner. You should not treat some staff more favorably than others. You should not behave in a manner that would lead other people to believe that some staff are treated more favorably than others." (Emphasis in original.)
 - B. Falsification of training records. "You indicated you were unaware of this specific record. However, as the administrator of CTU, you are responsible for subordinate staff's actions and must ensure that all records are accurate and in accordance with DOC policy."
 - C. Time cards and compensatory time were not accurately kept. Compensatory time was not granted in accordance with CDOC AR 1450-14;

¹ Archuletta reviewed and discussed the allegations of failure to allow employees to take pre-approved sick leave for doctor's appointments at the pre-disciplinary meetings with both Martinez and Baum.

- D. Remaining within view during strip searches of male inmates;
 - E. CTU buses were not maintained per DOT regulations and unsafe buses were allowed to transport inmates;
 - F. Captain Baum developed a promotional testing procedure for sergeant level positions within CTU, in violation of state personnel rules. "[O]fficers were promoted to the rank of Sergeant after undergoing a testing procedure at CTU, which consisted of a written test, a bus test, a firearms qualification . . . , a sergeant's evaluation, and an oral interview. This is in direct violation of State Personnel Rules, which state that after referral of the eligible candidates by the Human Resources office, no additional examination may be given. Only the Office of Human Resources Office is authorized to conduct testing procedures. You are instructed to cease this practice immediately."
 - G. There is a high degree of favoritism toward certain members of the unit regarding preferred job assignments, promotion, training opportunities, and evaluations. "Staff complained that routinely a CO I was left in charge of the desk, when in fact a higher level staff should have been assigned to that duty. Once again, you must be aware how staff will perceive this issue as favoritism toward the CO I. Effective supervisors do not act in a manner that gives an obvious perception of favoritism. As managers, we must ensure that our actions and decisions reflect a professional, and not personal, approach to the job and that they demonstrate **fair and consistent treatment of all staff.**" (Emphasis in original.)
122. Archuletta noted that while each allegation alone may not rise above a corrective action level, "when viewed in totality, I believe that your actions as well as lack of responsible managerial oversight rise to the level of failure to perform competently and require me to impose both disciplinary and corrective action."
123. On July 17, 2003, Archuletta sent Martinez a letter imposing a \$300.00 fine, deducted over three months in \$100.00 increments. He also imposed a corrective action. His findings included the following:
- A. Conduct giving rise to the widespread perception of an inappropriate relationship between himself and Captain Baum, including being together constantly; accompanying her on most out of state trips. "As a supervisor in the Central Transportation Unit, you must be conscious of the perceptions your behavior creates for subordinate staff. There is a definite belief that disparity in treatment occurs at CTU, and your actions and behavior with Captain Baum have contributed to that perception. You must relate to all staff in a *professional* manner and be conscious of how your actions and decisions could be perceived by subordinate staff." (Emphasis in original.)
 - B. Falsification of training records. "Mr. Martinez, you are responsible for the unit training records and for ensuring that they are accurate and in accordance with DOC policy."
 - C. Time cards and compensatory time were not accurately kept. Compensatory time was not granted in accordance with CDOC AR 1450-14.
 - D. CTU buses were not maintained per DOT regulations and unsafe buses were

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allowed to transport inmates.

- E. Captain Baum and he developed a promotional testing procedure for sergeant level positions within CTU, in violation of state personnel rules.
- F. There is a high degree of favoritism toward certain members of the unit regarding preferred job assignments, promotion, training opportunities, and evaluations. Archuletta noted, "Effective supervisors do not act in a manner that gives an obvious perception of favoritism. As managers, we must ensure that our actions and decisions reflect a professional, and not personal, approach to the job and that they demonstrate **fair and consistent treatment of all staff.**" (Emphasis in original.)

124. In both disciplinary action letters to Baum and Martinez, Archuletta states that he believes supervisors hold ultimate responsibility for the work environment created within their areas of responsibility. He stresses that their failure to assure consistent and impartial treatment of staff created the negative work environment in CTU. He states that supervisors are held to a higher standard of accountability because their actions affect the operations of the agency.

Corrective Action and Transfer of Martinez; Rescission of Corrective Action

125. Archuletta also imposed a corrective action on Martinez. This portion of the letter stated in part, "I have also determined that it would be in the best interest of the CTU work unit to provide you with an alternative work assignment. Effective August 1, 2003, you will be assigned to a facility. I will advise you of your new assignment in the near future."

126. Martinez was transferred to the Colorado State Penitentiary, where he holds the same CO III position he held formerly at CTU.

127. Martinez timely grieved the corrective action.

128. On November 7, 2003, Nolin Renfrow, Director of Prisons, issued a letter rescinding the corrective action, finding that a "letter of counseling, or informal performance appraisals, by your supervisor at the time would have adequately addressed any performance related issues; the formal corrective action should be rescinded."

129. Renfrow denied Martinez' request to have the transfer rescinded and to be reinstated to his former position at CTU. He determined, "Both the Central Transportation Unit and Colorado State Penitentiary (CSP) are benefiting from your reassignment; therefore; you shall maintain your assignment at CSP."

130. After Renfrow issued DOC's final agency response to Martinez' grievance of the corrective action, Martinez appealed to the Board, requesting reinstatement to his CTU position. During the hearing of this matter, the parties stipulated that Martinez' appeal would be consolidated herein.

131. Martinez' transfer out of CTU was in the best interest of all staff at CTU. In view of the

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findings above, it would be detrimental to the morale of CTU officers to reinstate Martinez to the unit.

132. Respondent provided Complainants with a copy of Inspector Claspell's investigative report during the discovery process well prior to hearing.
133. Captain Baum was generally not credible. Her statements regarding the issues of this case to Inspector Claspell, to Archuletta in the pre-disciplinary meeting, and at hearing, are contradictory and inconsistent. For example, she stated to Archuletta in the pre-disciplinary meeting that there was no A team. At hearing, after several of her own witnesses testified to there being an A team, she was forced to concede there was an A team. Regarding the promotional test for sergeants, in her meeting with Archuletta she stated, "the very first thing that we've got to . . . put on the record Lou, is it's not an exam." After Archuletta challenged her on the issue, she ultimately admitted that she referred to it as a test, and that the only individual that ever applied for the reallocated, posted position, was the one she had graded the highest. However, at hearing, she reasserted her initial position that it was just a "screening process."
134. Martinez' credibility was generally not good. His statements to Claspell, Archuletta, and at hearing, were also inconsistent.

DISCUSSION

I. Disciplinary Actions

A. Burden of Proof

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the Respondent has the burden to prove by preponderant evidence that Complainants committed the acts or omissions on which the discipline was based and that just cause warranted the discipline. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decisions only if the actions are found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

B. Complainants committed most of the acts for which they were disciplined.

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Captain Baum. As the Findings of Fact demonstrate, Captain Baum committed that acts in the disciplinary action letter outlined in Finding of Fact #121, subparagraphs A, C, F, and G. Specifically, she engaged in an ongoing pattern of conduct that gave rise to a perception of an inappropriate relationship with Martinez; she required her officers to report for work fifteen minutes early and did not compensate them for the time, in violation of DOC AR 1450-14; she utilized and published the results of a promotional testing procedure that "only the Office of Human Resources Office is authorized to conduct", in violation of Director's Procedure P-4-11; and she exerted a high degree of favoritism toward certain members of the unit, and acted in a manner that gave rise to a widespread perception of favoritism, on the unit. She failed to demonstrate fair and consistent treatment of all staff.

Complainant argues that because Archuletta, at hearing, could not articulate one specific example of her favoritism on CTU, Respondent has failed to prove that the favoritism occurred. This argument ignores the following: Respondent called several CTU officers, up to the lieutenant level, all of whom established the pattern of favoritism; Complainant's own witnesses acknowledged the existence of the A team, and those who were on it acknowledged having been personally invited on multiple out of state trips and having had their verbal requests for training approved; the investigative report provides a significant factual basis for the finding of favoritism.

Respondent failed to prove that Baum violated the strip search administrative regulation. Her presence in the general vicinity comported with rule, and there was no showing her presence rendered the searches disrespectful to the prisoners.

Respondent also failed to prove Baum had any connection with Martinez' falsification of the training record. Since no evidence was provided at hearing of a pattern of such falsification, there is an insufficient basis to impute knowledge to Baum on this issue.

Lastly, Respondent failed to demonstrate that Baum ordered CTU officers to drive unsafe buses, or that she neglected to assure the buses were properly maintained.

Lt. Martinez. As the Findings of Fact demonstrate, Lt. Martinez committed the acts in the disciplinary action letter outlined in Finding of Fact #123, subparagraphs A, B, C, E, and F. Specifically, he engaged in an ongoing pattern of conduct that gave rise to a perception of an inappropriate relationship with Baum; he required CTU officers to report for work fifteen minutes early and did not compensate them for the time, in violation of DOC AR 1450-14; he utilized a promotional testing procedure that "only the Office of Human Resources Office is authorized to conduct", in violation of Director's Procedure P-4-11; he participated in the favoritism as the lead recipient of it and by failing to assure that those under his command received equal treatment regarding assignment of transports, including out of state trips, and in response to requests for training; and he acted in a manner that gave rise to a widespread perception of favoritism on the unit.

Respondent failed to prove that Martinez neglected the maintenance of CTU buses or ordered any officer to drive an unsafe bus.

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C. Respondent's disciplinary actions were not arbitrary or capricious or contrary to rule or law.

Arbitrary or capricious exercise of discretion can arise in three ways, namely: (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239 (Colo. 2001).

Complainants moved to dismiss at the close of Respondent's case, arguing that the vague nature of the letters giving them notice of the R-6-10 pre-disciplinary meetings deprived them of due process of law. They contend that the pre-disciplinary process was fundamentally unfair.

Rule R-6-10 states,

"When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision."

Complainants were interviewed by Inspector Claspell in great detail regarding every issue discussed in the pre-disciplinary meetings with Archuletta. They arrived at the R-6-10 meeting fully aware of the issues that would be discussed. Nothing in Rule R-6-10 requires the appointing authority, under the facts of this case, to provide a list of each allegation of misconduct prior to the meeting.

Most importantly, at the R-6-10 meetings, Archuletta outlined each allegation of misconduct, provided the opportunity to present mitigating information, and then engaged both Baum and Martinez in lengthy discussions of many of the managerial issues facing CTU. Archuletta fully complied with Board Rule R-6-10. Complainants were not denied procedural due process during the pre-disciplinary process.

Complainants further assert that their rights as employees subject to a DOC investigation were violated, citing DOC AR 1150-04, Professional Standards for Investigations. That regulation contains two relevant provisions:

"A DOC employee under internal investigation, and when applicable, the Appointing Authority, will be informed of the general nature of the investigation, as soon as practical, after the complaint has been received. This provision will not apply to a complaint or investigation that would be jeopardized or compromised by such notification." [Page 6, Section I (1).]

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"All incidents which may constitute a felony, or appear to be of a criminal nature, . . . shall be referred immediately to the IG for review . . . In such cases, the IG will make the decision as to when the subject of the inquiry, or investigation, is notified of the details of the misconduct."

"All investigations of staff will be conducted in a manner such that information is held in a confidential manner." [Page 3, Sections C (4) and (6)]

The IG investigation was initially criminal in nature, thereby warranting confidentiality. More importantly, however, the investigation would have been jeopardized or compromised by notification to Baum and Martinez. When two supervisors are under investigation, and individuals who report to those supervisors are being questioned regarding favoritism and a climate of fear and reprisal, it is essential not to inform the supervisors of the investigation until all employees have been interviewed. Respondent did not violate Complainant's employee rights by waiting until the end of the investigation to notify them of the allegations.

Complainants also claim they never received notice of performance problems, and were given no chance to improve. They cite their 2002-2003 outstanding performance evaluations as evidence of a lack of such notice. Further, they argue that if the problems on the unit were serious, they would have given rise to grievances filed by CTU officers.

The evidence demonstrated that Captain Baum created a work environment where it was reasonable for employees to fear retaliation for filing grievances. Her argument that employees' issues were not serious enough to warrant grievances is therefore rejected.

Board Rule R-6-2 allows an appointing authority to bypass corrective action if "the act is so flagrant or serious that immediate discipline is proper." Here, the situation Baum and Martinez created at CTU was very serious.

Baum treated Martinez far better than all other officers, including lieutenants, on the unit. Many of the officers believed Baum and Martinez were having an affair. Captain Baum personally invited her favorite officers on the out of state trips, and left the remaining officers out of the loop. As a result, many of the officers not on the A team felt like second class citizens. Many officers on the unit believed that the sergeant promotions were predetermined by Captain Baum through her testing process. Baum and Martinez' actions were directly responsible for the low morale on the unit.

Archuletta was entirely justified in bypassing corrective action. He concluded that Baum and Martinez had not treated all staff consistently and impartially, and that their actions created a work environment and set a tone that was negative for all CTU staff.

While it is rare for high level state managers to discipline mid-level supervisors for managerial misconduct, Archuletta is right on track here. He took fair but firm action to assure that

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the highest standards of management are maintained. Archuletta recognizes that as appointing authority, he sets the tone for all managers that serve under his stewardship. Archuletta is to be commended for his strength of character and leadership in this situation.

II. Martinez appeal of transfer.

On November 7, 2003, Renfrow, Director of Prisons, issued his final agency response to Martinez' appeal of his corrective action. Renfrow rescinded the corrective action. He affirmed Martinez' transfer to a unit other than CTU. All that remains of Archuletta's action on July 17, 2003, therefore, is the disciplinary fine and the transfer.

In appealing his transfer, Martinez bears the burden of proving it was arbitrary, capricious, or contrary to rule or law. Director's Procedure P-4-5 governs transfers, and states in part, "An employee or an appointing authority may initiate a transfer. When the appointing authority initiates the transfer within the same department and the employee refuses it, the employee is deemed to have resigned."

Martinez has accepted his transfer by assuming his new position. He challenges the transfer here as unwarranted by the facts.² However, on the basis of the findings above, it is concluded that Martinez's transfer out of CTU is vital to the well being of the unit. It would be detrimental to the unit to bring him back. Hence, the transfer was not arbitrary, capricious, or contrary to rule or law.

III. Attorney fees are not warranted in this action.

Complainants have requested an award of attorney fees. Since Respondent prevailed, attorney fees and costs are not warranted.

CONCLUSIONS OF LAW

1. Complainants did commit many of the acts for which they were disciplined.
2. Respondent's actions were not arbitrary, capricious, or contrary to rule or law.
3. Attorney fees and costs are not warranted.

ORDER

Respondent's actions are **affirmed**. Complainant's appeals are dismissed with prejudice.

² Complainant's arguments regarding the corrective action are moot, as it has been rescinded. Notably, Martinez' grievance was not ripe for Board review, and hence consolidation herein, until the agency issued its final action rescinding the corrective action.

Dated this ____ day of February, 2004.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-764-1472

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of February, 2004, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Nicholas Gradisar
Gradisar, Trechter, Ripperger, Roth & Croshal
1836 Vinewood, Suite 200
Pueblo, Colorado 81005

and in the interagency mail, to:

Andrew M. Katarakawe
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
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Andrea C. Woods